In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 941

NEBRASKA NATIONAL HOTEL COMPANY, A NEBRASKA CORPORATION, PETITIONER

v.

GEORGE W. O'MALLEY, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The facts and the principal issue in this case are substantially the same as those in *Roy Bartels, et al.* v. *E. H. Birmingham, et al.*, and *Larry V. Geer, et al.* v. *E. H. Birmingham*, Nos. 731 and 732, this term. (R. 39–44.) The primary question is whether the musicians and leaders of various established orchestras (eleven in the *Bartels* and *Geer* cases and twenty-five here (R. 27)) who engaged their services to petitioners under identical employment contracts known as "Form B" were employees of petitioners within the meaning

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of the Social Security Act and corresponding provisions of the Internal Revenue Code. In each case the same type of orchestras were engaged through similar channels and performed their services upon petitioners' premises in the same manner. (R. 39–44.)

Under such circumstances it would not appear necessary for this Court to hear another case in order to safeguard any of petitioner's rights. These rights will be fully protected by keeping the case at issue in the Circuit Court of Appeals or by this Court holding the petition for certiorari in abeyance pending final disposition of Nos. 731 and 732. If either of these procedures be adopted, petitioner should, of course, be allowed to file a brief *amicus curiae* in Nos. 731 and 732.

Petitioner in this case has also argued, and the District Court found (R. 43–44), that the musicians (the sidemen, not merely the leaders) were entertainers engaged in an independent profession, and were therefore independent contractors and not employees subject to the Social Security Act at all. This contention is inconsistent with the decision of the Eighth Circuit in Nos. 731 and 732, of the Seventh Circuit in *Williams* v. *United States,* 126 F. 2d 129 (C. C. A. 7), certiorari denied, 317 U. S. 655, and *Spillson* v. *Smith,* 147 F. 2d 727 (C. C. A. 7), and with either the holdings or the implications of many District Court decisions. *General Wayne Inn* v. *Rothensies,* 47 F. Supp. 391 (E. D. Pa.); *Biltgen*

v. *Reynolds*, 58 F. Supp. 909 (D. C. Minn.); *Aberdeen Aerie No. 24, etc.* v. *United States*, 50 F. Supp. 734, (W. D. Wash.); *Los Angeles Athletic Club* v. *United States*, 54 F. Supp. 702 (S. D. Cal.), appeal dismissed 144 F. 2d 352; *In re Ten Eyck Co.*, 41 F. Supp. 375 (N. D. N. Y.); *Longo d/b/a Biffi Night Club* v. *Glenn* (W. D. Ky.), decided November 20, 1943, Vol. 1, C. C. H. Unemployment Insurance Service § 5054.192. The point is obviously without merit. It certainly would not warrant granting a petition for certiorari in advance of review by the Circuit Court of Appeals.[1]

Respectfully submitted,

GEORGE T. WASHINGTON,
Acting Solicitor General.

FEBRUARY, 1947.

[1] If the leaders should be held to be independent contractors, the petitioner hotel company would not be liable for the Social Security taxes on the leader or the sidemen and the Court would not reach the question whether the sidemen were independent contractors on their own account. If the leader is held to be an employee of the petitioner, it is inconceivable that the sidemen would not also be employees.

U. S. GOVERNMENT PRINTING OFFICE: 1947